80-888

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

JAMES D. ROWBOTHAM, Petitioner,

v.

AMERICAN AIRLINES,

INC., et al, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES D. ROWBOTHAM

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Petitioner In Pro Per

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

JAMES D. ROWBOTHAM, Petitioner,

v.

AMERICAN AIRLINES,

INC., et al, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner James D. Rowbotham respectfully prays that writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 8, 1980.

QUESTIONS PRESENTED

1. Whether any exception to the doctrine requiring the exhaustion of contractual remedial procedures exists to give the federal courts jurisdiction over petitioner's claims against American Airlines.

2. Whether a question of material fact exists as to whether the American Airlines Pilots System Board of Adjustment or its decision viloated the provisions of 45 USC 153(q).

3. Whether a question of material fact exists as to whether Allied Pilots Association breached its duty of fair representation.

4. Whether federal government employees acting contrary to statutes, agency regulations and/or in violation of an individual's constitutional rights enjoy absolute immunity from suits for damages.

---

1. PARTIES TO THE PROCEEDINGS IN THE NINTH CIRCUIT: Appeal No.78-3048; JAMES D. ROWBOTHAM v. AMERICAN AIRLINES, INC., et al; Albert V. Casey, as President; Gene E. Overbeck, as Vice-President; Charles A. Pasciuto, as Vice-President; Glen Walker, as attorney; Ludwig G. Lederer, individually and as Medical Director; William G. Budington, individually and as Medical Director, ALLIED PILOTS ASSOCIATION, et al, Nicholas J. O'Connell, as President and as consultant; Ralph L. Harkenrider, as Executive Administrator; Charles W. Fisher, as Legal Counsel; Fran C. Fosdick and Jack S. Pond, as representatives of a class, namely, all the Air Line Pilots in the service of American Airlines, Inc., UNITED STATES OF AMERICA, Federal Aviation

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OPINION BELOW

The opinion of the Court of Appeals appears in the Appendix hereto.

JUDGMENT BELOW

The Ninth Circuit enters Judgment at the time of entering opinion, "Judgment was entered in this case as of the file stamp date on the attached decision of the court".

ORDERS BELOW

The orders of the District Court appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 8, 1980. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC 1254(1).

STATUTES INVOLVED

45 USC 153(q) is contained in pertinent part in Appendix hereto.

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under: 28 USC 1331; 28 USC 1332(a); 45 USC 151 et seq; 45USC 153(q); 29 USC 185; 29 USC 411, 412; 29 USC 141 et seq; 28 USC 1343(4); 5 USC 552,552(a); 18 USC 241; and California Civil Code.

On June 7, 1973, the petitioner, a nine year veteran pilot with American Airlines (American), was permanently discharged by American's Corporate Medical Director, who told the petitioner,"you will never fly for American again". American did not furnish the petitioner with the contractually re-

quired prior written notice of dismissal or with the required prior written notice of medical concern, nor had American made any diagnosis of petitioner's physical condition. Contractually, petitioner could not dispute the discharge until after he had received the required written notice of dismissal, nor could he dispute any American medical concern until after he had received the required notice in writing specifying American's medical concern. The following day, June 8, 1973, the Medical Director completed a medical examiner's report affecting the petitioner, which contained no medical diagnosis, but did refer to the petitioner as "removed from flight status permanently".

Petitioner complained to his union, Allied Pilots Association (Allied) about the wrongful discharge and furnished it with expert medical evidence supporting his position. Allied did not advise petitioner to file a grievance of any kind; did not insist upon American abiding by the terms of the Collective Bargaining Agreement (Agree-

ment); nor did it contact petitioner's doctor or obtain a medical examination of its own. After petitioner started complaining to Allied, his pilots license was suspended by the Federal Aviation Administration(FAA). FAA certified records prove, and the responsible FAA doctor testified, that the petitioner's pilots license was suspended because of a surreptitious telephone conversation with American's Corporate Medical Director on July 31, 1973, in which the Medical Director advised the FAA doctor that the petitioner "is permanently grounded and will not fly for American again", and misrepresented portions of petitioner's medical records in the possession of American. The Agreement prohibits American from divulging any information from medical records outside the Company.

By letter, with copies to Allied, petitioner repeatedly demanded the contractually required notices and contractually required exact duplicate copies of all medical examiner's reports affecting him.

American refused, with copies to Allied, which did nothing to enforce the terms of the Agreement. Petitioner submitted to Allied allegations of contract violations alleging that American breached the Agreement by failing and refusing to furnish the required notices and reports and by divulging medical records information to the FAA. Allied did not file petitioner's grievance; but instead, composed a grievance petition alleging only improper reimbursement of accrued sick leave and sick leave pay. No other grievance petition was ever filed on petitioner's behalf. Contractually, Allied has sole power to file grievance petitions. At the joint adjustment board hearing of such grievance, Allied: 1) called no medical witnesses to support petitioner's medical evidence, 2) did not require any witnesses to be sworn, 3) did not require documents read into the record by American's witnesses to be examined or put into the record as exhibits, and 4) did not challenge statements by American's Corporate Medical Director that

American would not furnish petitioner with the required notice of medical concern and that American would never allow petitioner to be medically evaluated by a three doctor panel, as required by the Agreement.

The joint Adjustment Board's decision went outside the grievance petition to make factual assertions (Findings), including, that, as of October 8, 1974, petitioner had belatedly been furnished medical records and that the petitioner knew in conversations with American's doctors why he was put on sick leave. Only one Board member was questioned on the Findings; he, the union member, testified; that the Findings were made on unrecorded post-hearing assertions by American's Medical Director, that he did not know what petitioner knew from conversations with American's doctors, and that reinstatement of petitioner's pilots license would be at petitioner's expense. American's Corporate Medical Director testified that on the advise of American he, the sole custodian of Ameri-

can's medical records, never furnished petitioner with the medical records to which he was entitled. After the Adjustment Board decision was rendered, the petitioner advised Allied that he had not received the medical records to which he was contractually entitled and that American was continuing to refuse to furnish him with the notices and records which he contractually had to have in order to dispute the discharge and any medical opinion by American. Relying on the joint Adjustment Board findings, Allied refused to assist the petitioner.

In the district court, petitioner, in pro per, filed: 1) petition for review of the Adjustment Board decision, 2) breach of contract suit against American, 3) breach of the duty of fair representation suit against Allied, and 4) damage suit against certain FAA employees. Jury trials were demanded in all but the petition for review action. The district court dismissed the breach of contract action against American on the grounds that petitioner's

sole remedy as to any claims against American lay with the contractual remedial procedures; the three other actions received summary judgments in favor of the defendants. Petitioner, in pro per, appealed to the Ninth Circuit from all district court summary judgments and dismissals. The Nintg Circuit affirmed all summary judgments and dismissals.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW PRECLUDES ALL JUDICIAL REVIEW OF ANY PORTION OF ARBITRATION DECISIONS RENDERED UNDER THE RAILWAY LABOR ACT.

Hundreds of thousands of Railway and Airline employees are affected by the judicial administration of the Railway Labor Act. They rely upon proper overseeing of adjustment board decisions by the courts. Here, the Ninth Circuit misinterpreted 45 USC 153(q) and this Court's decision in SHEEHAN, UNION PACIFIC R. CO. v SHEEHAN, 1978, 439

US 89. In SHEEHAN this Court set out the required allegations in order to grant review, as:

> The dispositive question is whether the party's objections to the Adjustment Board's decision fall within any of the three limited categories of review provided for in the Railway Labor Act. SHEEHAN, supra at 93.

SHEEHAN cannot be read, as the Ninth Circuit did, to mean that adjustment board decision findings are conclusive prior to review, when the required 45 USC 153(q) objections have been made:

> Section 153 First (q) unequivocally states that the"findings and order of the (Adjustment Board) shall be conclusive on the parties" and may be set aside only for the three reasons specified therein, SHEEHAN, supra at 93.

But, dispite the fact that the petition for review here alleged each of the objections contained in 45 USC 153(q), the Ninth Circuit precluded any review by holding:

> Given no breech (of the duty of fair representation), the Sheehan and statutory standards

> are applicable and no judicial review of the Adjustment Board's decision is presently available to Rowbotham.

Here the record shows that the Adjustment Board went outside the grievance petition submission to make assertions of fact (Findings) which have no basis in reason or fact, but which were purposely made to prevent the petitioner from exhausting the contractual remedial procedures and to cover-up American's repudiations of them. Certainly Congress never intended 45 USC 153(q) to be a shield to protect the employer from the natural consequences for its breach of contract. But, such a shield is exactly what the Adjustment Board's decision is here. If American is allowed to hide behind the finality provisions of 45 USC 153 (q), the shield becomes absolute.

The decision below deserves the attention of this Court, because it not only precludes review of this Adjustment Board decision, it deprives all Railway and Airline employees from future review, even if they

make the required objections.

The petition for writ should be granted , because of the need for standarized interpretations of 45 USC 153(q) and for clarification of the implications of SHEEHAN.

2. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER APPELLATE COURTS AS TO EMPLOYEES' RECOURSE TO THE COURTS WHEN AN EMPLOYER REPUDIATES CONTRACTUAL REMEDIAL PROCEDURES.

In Appeal NO. 78-3048, American is a party, charged with breach of contract, in addition to Allied. The petitioner argued, and the record proves, that American repudiated all contractual remedial procedures. The District Court dismissed American on the grounds that the petitioner had not exhausted the contractual remedial procedures. The Ninth Circuit summarily affirmed. Both courts ignored the first exception to the exhaustion doctrine set forth in VACA v. SIPES, 1967, 386 US 171.

In VACA, this Court held that when an

employer's action amounts to repudiation of the contractual remedial procedures, the employee may go to the courts for redress of breach of contract and the employer is estopped from relying upon unexhausted remedial procedures as a defense, VACA supra at 185.

The record shows that the petitioner was wrongfully discharged in 1973 and that he attempted to exhaust the contractual remedial procedures. The discharge was wrongful, because American failed and refused to furnish him with the contractually required prior written notice of dismissal. DAY v UNITED AUTOMOBILE, AERO. & AGR. IMP. WKRS., LOCAL 36 (1972, 6th Cir.) 466 F. 2d. 83,92, held that discharge without notice in accordance with the collective bargaining agreement results in a wrongful discharge and the employer cannot insist on exhaustion of the contractual remedial procedures. The petitioner was unable to request a discharge hearing, because contractually he had to receive written

discharge notice first, Allied had sole power to file grievance petitions, and it ignored the discharge. Ninth Circuit decision's inference that the grievance hearing and Adjustment Board decision concerned discharge/termination and its assuption that "Rowbotham could return to flying if he recovered within five years of the expiration of his paid sick leave" are totally devoid of evidentiary support.

The Ninth Circuit decision leaves the petitioner in the position which this Court in HINES held no employee should be left in--wrongfully discharged, without a fair opportunity to secure an adequate remedy, HINES v ANCHOR MOTOR FREIGHT, INC., 1976, 424 US 554,571. Employer repudiation leaves injured employees defenseless. If the courts refuse to recognize employer repudiation as a valid exception to the exhaustion doctrine, every person working under a working agreement has lost what this Court considered to be an "obvious" exception.

These conflicts justify the grant of

certiorari to review the judgment below.

3. THE DECSION BELOW CONFLICTS WITH DECISIONS OF OTHER APPELLATE COURTS AS TO WHAT KIND OF UNION CONDUCT WILL CONSTITUTE BREACHES OF UNIONS' STATUTORY DUTY OF FAIR REPRESENTATION.

Allied is charged with breach of the duty of fair representation, The Ninth Circuit affirmed summary judgment on the grounds that:

> According to the language of the collective bargaining agreement, Rowbotham could return to flying if he recovered within five years of the expiration of his paid sick leave. Given this provision, it was not arbitrary, discriminatory, or in bad faith for the union not to argue for Rowbotham's reinstatement.

Under Rule 56, Federal Rules of Civil Procedures, Judges cannot decide factual issues or weigh evidence; also, a jury trial was demanded. Holding that "Rowbotham could return to flying if he recovered within five years..." is totally unsupported by the evidence in the record.

Quite to the contrary, American repudiated all reinstatement procedures, and American's Corporate Medical Director and its Director of Pilots Contracts told Allied that the contractual medical evaluation procedures would never be allowed in petitioner's case --Allied did not protest.(Adjustment Board Transcript) We are left with the Ninth Circuit affirming on the grounds that Allied's refusal to "argue" for petitioner's reinstatement was not arbitrary, discriminatory, or in bad faith.

Except for the decision here, ever since this Court's decision in VACA v SIPES, 1967, 386 US 171, no appellate court has ever held that it is not a breach of the duty of fair representation to ignore a meritorious grievance. Here petitioner was discharged and Allied ignored petitioner's complaints about the discharge and his attempts to get its support in grieving the wrongful discharge. GRIFFIN v INTERNATIONAL U., UNITED AUTOMOBILE, A. & A.I.W. (1972,4th Cir.) 469 F. 2d. 181,183, held that "A union must especially

avoid capricious and arbitrary behavior in the handling of a grievance based on discharge--the industrial equivalent of capital punishment" and that "unreasonable"union conduct constitutes a violation of the duty of fair representation. The record here shows that Allied never investigated petitioner's allegations of contract violations, never made a decision that they lacked merit, and never processed his grievance submission. DE ARROYO v SINDICATO DE TRABAJADORES PACKING., AFL-CIO (1970, 1st Cir) 425 F. 2d 281,285, held that union's failure to adequately investigate the merits of a grievance is arbitrary union conduct. See also HINES v ANCHOR MOTOR FREIGHT, 1976, 424 US 554,560n.4. The record shows that Allied never informed petitioner that it had decided not to process his grievance allegations or argue on his behalf. RUZICKA v GENERAL MOTORS CORPORATION (1975, 6th cir) 523 F. 2d. 306,310,316, held that "such negligent handling of the grievance, unrelated as it was to the merits of Ap-

pellant's case, amounts to unfair representation. It is a clear example of arbitrary and perfunctory handling of a grievance." and "action will lie against a union for... such gross mistake or inaction as to imply bad faith". The record shows that Allied never informed petitioner that it would not argue for his reinstatement or its reasons why. DAY, supra 466 F. 2d at 98, held that union official withdrawing member's grievance without notice to him, without union hearing, and without giving the member the reasons why presented a jury question as to breach of duty of fair representation. Contractually Allied had sole power to file grievance petitions. VACA, supra at 186, held that Congress did not intend "to confer upon unions such unlimited discretion to deprive injured employees of all remedies for breach of contract" and that when union prevents exhaustion of the contractual remedial procedures for a wrongfully discharged employee, it would be a "great injustice to leave the employee

remediless".

The record shows that after petitioner's wrongful discharge and contract violations by American, the only grievance petition filed by Allied, on petitioner's behalf, concerned only reimbursement for accrued sick leave and sick leave pay. Allied's jurisdictional statement and "Question at Issue":

> The Board shall consider any dispute properly submitted to it by the President of the Association or by the Vice President-Flight of the Company, when such dispute has not perviously been settled in accordance with the terms provided for in the Pilots' Agreement...1. QUESTION AT ISSUE. Whether the Company violated Sections 8, 14, and all related Sections of the Agreement in failing to properly apply sick leave and pay provisions to J.D. Rowbotham commencing during May 1973 and thereafter.

RUZICKA, supra at 315, held that "capricious or superficial" union conduct equates to "arbitrary and perfunctory" union conduct. Allied's representation of the wrongfully discharged petitioner has left him without a job and without a fair opportunity to secure an adequate remedy, HINES, supra

at 571. held that such a predicament is not acceptable under the concept of fair representation.

The decision below raises significant and recurring problems concerning judicial enforcement of the duty of fair representation, which affect every union member in every industry.

These conflicts justify the grant of certiorari to review the judgment below.

4. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRINCIPLE THAT FEDERAL EMPLOYEES DO NOT ENJOY BLANKET ABSOLUTE IMMUNITY FROM SUITS FOR DAMAGES.

Parties to Appeal No. 78-3048 include federal goverment employees who are charged with acting contrary to statutes, agency regulations and/or violating petitioner's constitutional rights. The district court granted summary judgment on the grounds that all federal government employees enjoy absolute immunity. The Ninth Circuit summarily affirmed.

BUTZ v ECONOMOU, 1978, 98 S.Ct. 2894, 2905, held:

> Beyond that, however, neither case (BARR, SPALDING) purpored to abolish the liability of federal officers for actions manifestly beyond their line of duty and if they are accountable when they stray beyond the plain limits of their statutory authority, it would be incongrous to hold that they may nevertheless willfully or knowingly violate constitutional rights without fear of liability.

The conflict between this Court and the court below is direct, irreconcilable and affects every citizen and government employee.

This conflict justifies the grant of certiorari to review the judgment below.

Finally, the decision below displays disregard of appellate courts' responsibility to adequately review the record.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

James D Rowtotham

JAMES D. ROWBOTHAM

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Petitioner In Pro Per

DATED: NOVEMBER 19, 1980

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 8, 1980

JAMES D. ROWBOTHAM, No. 78-3047

Plaintiff-Appellant, No. 78-3048

vs. DC#CV-76-2265 CFP

AMERICAN AIRLINES, INC., et al., MEMORANDUM

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Califronia

Submitted- June 12, 1980

Before: TANG and SKOPIL, Circuit Judges, and KELLEHER,* District Judge.

Rowbotham appeals from the district court's entry of summary judgment against him in these two related actions. In the first action, No. 78-3047, Rowbotham challenges the finding of the American Airlines Pilots System Board of Adjustment (Adjustment Board) that he was properly termin-

ated as a pilot because of his health. In the second action, No. 78-3048, he claims that the Allied Pilots Association (the Union) breached its duty of fair representation.

I.

Adjustment Board Decision

The Supreme Court in Union Pacific Railroad Co. v. Sheehan, 439 U.S. 89 (1978), enunciated the statutory test for judicial review of Adjustment Board Orders. Such review is limited to three specific grounds: (1) failure of the Adjustment Board to comply with the requirements of the Railway Labor Act; (2) failure of the Adjustment Board to conform, or confine, itself to matters within the scope of its jurisdiction, and (3) fraud or corruption. See 45 U.S.C. 153(q).

---

* Honorable Robert J. Kelleher, United District Judge for the District of Northern California, sitting by designation.

Rowbotham asserts that the Adjustment Board decision was "rigged," but he cites no facts supporting this conclusion. He also questions the conclusions of the Adjustment Board by stating that it incorrectly concluded that (1) he was not denied copies of reports to which he was entitled; and (2) he was improperly notified of his dismissal. Under Sheehan, however, these determinations are not subject to judicial review.

Rowbotham attempts to distinguish Sheehan and the limited judicial review afforded by 45 U.S.C. 153(q) by stating that these limitations are not applicable in a case in which the Union has breached its duty of fair representation. It is true that in Glover v. St. Louis-San Francisco R. Co., 393 U.S. 324,328 (1969), the Supreme Court recognized that an employee may bypass the Adjustment Board and bring a wrongful discharge action in district court when his union is guilty of a breach of the duty of fair representation.

See Franklin v. Southern Pacific Transportation Co., 593 F. 2d 899, 901 (9th Cir. 1979). In the instant case, as discussed infr, we find no issue of material fact regarding whether the Union breached this duty. Given no breach, the Sheehan and statutory standards are applicable and no judicial review of the Adjustment Board's decision is presently available to Rowbotham.

II.

DUTY OF FAIR REPRESENTATION

A breach of the statutory duty of fair representation occurs only when a union's conduct toward its member is arbitrary, discriminatory, or in bad faith. Vaca v. Sipes, 386 U.S. 171,190 (1967). An individual employee does not have an absolute right to have his grievance processed to arbitration; and in order to facilitate the settlement of frivolous grievances, a union is given some discretion in its endeavor to end grievances prior to the most costly and time consuming steps. See Vaca v. Sipes,

386 U.S. at 191. A union is accorded great latitude and courts are hestitant to interfere with union decisions regarding the handling of employee grievances unless the union shows a reckless disregard for the rights of the individual employee. Ness v. Safeway Stores, Inc., 598 F. 2d 558 (9th Cir. 1979). A union, however, is subject to complete good faith and honesty of purpose in the exercise of its discretion. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554,565 (1976).

In the instant case, the Union represented a member who had lost consiousness and experienced convulsions on several occasions. According to the language of the collective bargaining agreement, Rowbotham could return to flying if he recovered within five years of the expiration of his paid sick leave. Given this provision, it was not arbitrary, discriminatory, or in bad faith for the Union not to argue for Rowbotham's reinstatement. As to Row-

botham's other grievance requests, the Union represented him throughout the grievance procedure, made telephone calls on his behalf, and processed the life insurance grievance all the way through the Adjustment Board to arbitration. This matter was resolved in Rowbotham's favor.

Although the district court only referred to the Union's obligation of good faith and not to the prohibition against a union's arbitrary or discriminatory action, it is clear from the record as a whole that it applied the correct standard. We find no error in the grant of summary judgment for the Union on this cause of action.

Affirmed.

APPENDIX B

FILED

AUG 10, 1977

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JAMES D. ROWBOTHAM,

Plaintiff,

vs.

AMERICAN AIRLINES, INC., et al., Albert V. Casey, as President; Gene E. Overbeck, as Vice President; Charles A. Pasciuto, as Vice President; Glen Walker, as attorney; Ludwig G. Lederer, individually and as Medical Director; William G. Budington, individually and as Medical Director, Defendants, ALLIED PILOTS ASSOCIATION, et al., Nicholas J. O'Connel, as

NO. C-77-0667-CFP

ORDER GRANTING MOTION OF DEFENDANT ALLIED PILOTS ASSOCIATION FOR SUMMARY JUDGMENT

President and as Conslu-
tant; Ralph L. Harkenrider,
As Executive Administrator;
Charles W. Fisher, as Legal
Counsel; Fran C. Fosdick and
Jack S. Pond, as represent-
atives of a class, namely,
all the Air Line Pilots in
the service of American Air-
lines, Inc., Defendants,
United States Of American,
Federal Aviation Administra-
tion, individually and as its
agent; Department of Trans-
portation, individually and
as its agent, Defendants,
FRANK K. RAYMOND, M.D.,
individually and as an
employee of Federal Aviation
Administration, Defendant,
GEORGE E. BECKERMAN, M.D.,
Defendant, DEWITTE T. LAWSON,
individually and as an em-

ployee of Federal Aviation Administration, Defendant.

This cause came on regularly for hearing on July 29, 1977, on the motion of defendant Allied Pilots Association ("Allied") to dismiss and for summary judgment on the grounds that (1) there is no genuine issue of any material fact in dispute, (2) the record of the Board of Adjustment proceedings as well as all other evidence presently before this Court establishes as a matter of law that Allied did not arbitrarily, discriminatorily or in bad faith represent plaintiff during the course of his grievance proceedings, nor did it arbitrarily, discriminatorily or in bad faith refuse to fund plaintiff's various legal activities, and (3) plaintiff's allegations of slander are time-barred. Plaintiff having appeared in pro-pria persona and defendant Allied having appeared through its counsel, and the Court, having considered all documents filed in support of and in opposition to

said motion, and having reviewed the record of the proceedings before the Pilots System Board of Adjustment filed in the related action of Rowbotham v. American Airlines, Inc., C-76-2265, and finding no genuine issue of material fact in dispute,

IT IS ORDERED that defendant's motion to dismiss and for summary judgment be, and the same hereby is, granted, and that judgment be entered herein in favor of the defendant Allied Pilots Association and against plaintiff with costs to be taxed by the Clerk.

DATED: 10 AUG 1977

CECIL F. POOLE
UNITED STATES DISTRICT
JUDGE

APPENDIX C

FILED

AUG 10, 1977

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JAMES D. ROWBOTHAM, Plaintiff, vs. AMERICAN AIRLINES, INC., et al., Albert V. Casey, as President; Gene E. Overbeck as Vice President; Charles A. Pasciuto, as Vice President; Glen Walker, as attorney; Ludwig G. Lederer, individually and as Medical Director; William G. Budington, individually and as Medical Director, Defends, ALLIED PILOTS ASSOCIATION, et al.; Nicholas J. O'Connell, as President and as Con-

NO. C-77-0667-CFP

ORDER GRANTING MOTION OF DEFENDANTS AMERICAN AIRLINES, INC., DR. LUDWIG G. LEDERER, AND DR. WILLIAM G. BUDINGTON TO DISMISS

sultant; Ralph L. Harkenrider, as Executive Administrator; Charles W. Fisher, as Legal Counsel; Fran C. Fosdick and Jack S. Pond, as representatives of a class, namely, all the Air Line Pilots in the service of American Airlines, Inc., Defendants, UNITED STATES OF AMERICAN, Federal Aviation Administration, individually and as its agent; Department of Transportation, individually and as its agent, Defendants, FRANK K. RAYMOND, M.D.„ individually and as an employee of Federal Aviation Administration, Defendant,

GEORGE E. BECKERMAN, M. D., Defendant, DEWITTE T. LAWSON, individually and as an employee of Federal Aviation Administration, Defendant.

This cause came on regularly for hearing on July 29, 1977, on the motion of defendants American Airlines, Inc. ("American"), Dr. Ludwig G. Lederer and Dr. William G. Budington to dismiss and for summary judgment on the grounds that this Court is without jurisdiction because (1) plaintiff seeks by this lawsuit to retry on the merits alleged breaches of the collective bargaining agreement between American and plaintiff's union, Allied Pilots Association, which have been finally and conclusively resolved by a Pilots System Board of Adjustment established pursuant to the requiements of the Railway Labor Act, 45 U.S.C. 151, et seq.; (2) decisions of such boards are

final and binding and cannot be retried directly or indirectly on their merits, Bernhardt v. American Airlines, Inc., 511 F. 2d 1219 (9th Cir.) ; (3) plaintiff is already pursuing his sole remedy of judicial review of the Pilots System Board of Adjustment decision under 45 U.S.C. 153 (q) in Rowbotham v. American Airline , Inc., C-76-2265. Plaintiff having appeared in propria persona and defendants having appeared through their counsel of record, and the Court having considered all the documents filed in support of and in opposition to said motion and finding itself without jurisdiction to entertain this action, IT IS THEREFORE ORDERED that defendants' motion to dismiss this action be, and the same hereby is, granted, AND IT IS FURTHER ORDERED that a judgment of dismissal be entered for defendants American Airlines, Inc., Dr. Ludwig G. Lederer, and Dr. William G. Budington, and that said defendants be awarded their costs as taxed by the Clerk.

DATED: 10 AUG 1977

CECIL F. POOLE

UNITED STATES DISTRICT JUDGE

APPENDIX D

FILED

MAY 12, 1978

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAMES D. ROWBOTHAM,	CIVIL NO. C-77-0667-
Plaintiff,	CFP
vs.	ORDER and SUMMARY
AMERICAN AIRLINES,	JUDGMENT
INC., et al., etc.,	
Defendants.	

This action having come regularly on for hearing before the Court on the motion of the Federal defendants to dismiss or in the alternative for summary judgment, and

The respective parties having been afforded an opportunity to be heard, the Court having considered the respective pleadings and the arguments thereon, and the entire matter having been duly submitted after the Court was fully advised thereon,

IT IS HEREBY ORDERED that:

1. The Federal defendants' motion, considered as a motion for summary judgment, is GRANTED;

2. Summary judgment is entered in favor of the Federal defendants and against the plaintiff; and

3. Each party shall bear its own costs.

Dated: May 12, 1978

U.S. DISTRICT JUDGE

APPENDIX E

FILED

DEC 9, 1977

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JAMES D. ROWBOTHAM, No. C-76-2265 CFP

Petitioner, ORDER

vs.

AMERICAN AIRLINES, INC.,

Respondent.

This cause came on for hearing on December 9, 1977 on the motion of petitioner James D. Rowbotham and on the cross-motion of respondent American Airlines, Inc. for summary judgment, and the Court having considered the matter, and good cause appearing therefor,

IT IS HEREBY ORDERED that summary judgment is granted in favor of respondent;

IT IS HEREBY FURTHER ORDERED that petitioner's complaint is dismissed.

DATED: December 9, 1977

UNITED STATES DISTRICT JUDGE

APPENDIX F

45 USC 153(q) reads, in pertinent:

If any employee...is agrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee...may file in any United States district court...a petition for review of the division's order ...On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

CERTIFICATE OF SERVICE

I hereby certify that on the 24 day of NOVEMBER 1980, I served the within PETITION FOR WRIT OF CERTIORARI on the interested parties in said action, by placing three true and correct copies in each of three sealed envelopes, with postage thereon fully prepaid, in the United States mail at Redwood City, California, addressed as follows:
Solicitor General, Department of Justice, Washington, D.C. 20530; BROBECK,PHLEGER & HARRISON, One Market Plaza, San Francisco, CA 94105;P.R.S. Bupara, U.S. Attorney, 450 Golden Gate Ave., San Francisco, CA 94102.

I CERTIFY under penality of perjury that the foregong is true and correct. EXECUTED ON NOVEMBER 24 1980 in Redwood City, California.

James D Rowbotham

JAMES D. ROWBOTHAM

DEC 29 1980

MICHAEL RODAK, JR., CLERK

No. 80-888

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES D. ROWBOTHAM, *Petitioner*

vs.

AMERICAN AIRLINES, INC., et al., *Respondents*

Brief of American Airlines, Inc., Allied Pilots Assoc., and All Other Non-Federal Respondents in Opposition

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JAMES L. MEEDER

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No. 80-888

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vs.

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Brief of American Airlines, Inc., Allied Pilots Assoc., and All Other Non-Federal Respondents in Opposition

OPINIONS BELOW

The decision of the Court of Appeals, appended to the Petition, is unpublished, 628 F.2d 1357, and, as such, is not precedent in the Ninth Circuit. 9th Cir. R. 21(a) and (c).

STATEMENT OF CASE[1]

On October 5, 1973, Dr. L. G. Lederer, Medical Director of American Airlines, Inc. ("American"), sent petitioner James D. Rowbotham, then employed as a co-pilot for American, a certified letter informing him in no uncertain terms that he was

> ". . . permanently disqualified from flying status because of a convulsive brain disorder."

1. The case is restated here as petitioner's statement contains many inaccuracies.

(Lederer Deposition, Ex. 60.) The letter went on to state:

> "As you may recall, after preliminary examination by Dr. Budington and reports from the Sequoia Hospital, dated May 23, 1973, and my own examination of you and your history on June 7, 1973, we came to the conclusion that you had a medical condition which was incompatible with the safe operation of aircraft. It was further our opinion that this medical condition is permanent and needs medication for control."

(Lederer Deposition, Ex. 60.)

The Collective Bargaining Agreement then in effect between American and the Allied Pilots Association ("Allied") specifically provided in Section 26(D) that if American determined a pilot was medically disqualified from flying, *the pilot* could

> ". . . employ a qualified medical examiner of his own choosing and at his own expense for the purpose of conducting a physical examination for the same purpose as the physical examination made by the medical examiner employed by the Company."

(C.R. (1) 95, 96.)[2] And, if the medical examiner[3] retained by the pilot verified the findings of American's medical examiner, "no further medical review of the case shall be afforded." (C.R. (1) 96.) In the event the findings disagreed

> ". . . the Company will *at the written request of the employee* ask that the two (2) medical examiners agree upon and appoint a third (3rd) qualified and disinterested medical examiner, preferably a specialist for the purpose of making a further physical examination of the employee.

---

2. "C.R. (1) ....." means Clerk's Record of District Court Case No. 77-0667 CFP which record was before the Ninth Circuit. "C.R. (2) ....." means Clerk's Record of District Court Case No. 76-2265 CFP which record was before the Ninth Circuit.

3. By "medical examiner" is meant any "aviation medical examiner" specifically designated by the FAA. 14 CFR § 67.23 and Section 26(B) of the Agreement. (C.R. (1) 95.)

> "The . . . disinterested medical examiner shall then make a further examination of the pilot . . . and the case *shall be settled on the basis of his findings.*"[4]

(C.R. (1) 96.)

Petitioner never used this direct and simple procedure to resolve the question of his fitness to fly for American. Rather, he has continually avoided the question and, acting as his own doctor and lawyer, has thrashed about in numerous lawsuits which have had no discernible purpose other than the harassment of American, Allied, the Federal Aviation Administration ("FAA"), and the multitude of individuals employed by these various organizations.

Petitioner did file a grievance on a number of issues pursuant to Section 29 of the Collective Bargaining Agreement, which grievance was heard by the American Airlines Pilots' System Board of Adjustment ("Adjustment Board") on March 27, May 14 and 15, 1974.[5]

He submitted nine separate demands to the Adjustment Board (A.B. Tr. Vol. II 136-140) and, when questioned whether he had any other demands, he responded by stating:

> "I think a notation might be made of the contract violations that I allege. And they have been made by Mr. Fisher."

(A.B. Tr. Vol. II 140:7-10.)[6]

Mr. Fisher is Charles W. Fisher, Esq., an attorney for Allied employed to handle grievances of pilots. (Fisher Deposition, 6:5-

---

4. All emphasis is added unless otherwise indicated.

5. American is a carrier by air within the meaning of Section 201 of the Railway Labor Act, 45 U.S.C. § 181, *et seq.* American's Adjustment Board has been established pursuant to the mandatory requirements of 45 U.S.C. § 184 for the resolution of minor disputes between American, its employees and Allied. The Adjustment Board is composed of four members: two from American and two from Allied. All majority decisions of the Adjustment Board are *final* and binding. If the Board deadlocks on an issue, a neutral arbitrator is selected to resolve the dispute. See Sections 28 and 29 of the Agreement.

6. "A.B. Tr. ....." means the transcript of Adjustment Board hearing.

22.) Fisher represented petitioner throughout the grievance procedure. The contract violations referred to by petitioner were those set forth by Fisher in his opening remarks before the Adjustment Board. (A.B. Tr. Vol. II 37-40.)

On October 8, 1974, the Adjustment Board rendered a nine-page memorandum of decision wherein it found that eight of petitioner's demands had been complied with or were without the scope of the Collective Bargaining Agreement. On the issue of full coverage under a new life insurance policy, the Adjustment Board deadlocked. That issue was taken to arbitration by Allied and was resolved in petitioner's favor.

On petitioner's grievance demand for a letter from American stating that he could return to fly for American within five years after the end of his sick leave if he was fit, the Adjustment Board made this finding:

> "[Supplement F of the Collective Bargaining Agrement] provides that a pilot who is receiving disability payment and subsequently recovers his health may return to flying, if he recovers within 5 years of the expiration of his paid sick leave. Therefore, the Board finds the grievant's demand redundant and there is no contractual provision requiring a letter from the Vice President of Flight."

In other words, in order to obtain reinstatement as a pilot for American, all petitioner had to do was to demonstrate that he had recovered his health within 5 years and was again qualified to fly. This is exactly what Section 26(D) of the Collective Bargaining Agreement (the mechanism whereby a pilot may challenge his medical disqualification) is designed to do. And, it is exactly that mechanism petitioner never used.

On October 12, 1976 appellant filed a complaint, *in propria persona,* in the United States District Court for the Northern District of California against the Adjustment Board seeking to set aside its decision of October 8, 1974, because of, *inter alia,* fraud and corruption and various procedural irregularities.

On April 1, 1977, appellant, again acting *in propria persona,* filed a second complaint. That complaint was 94 pages in length and prayed for damages totalling 116 million dollars. On May 13, 1977 appellant filed a sixteen page amendment to his complaint seeking an additional 30 million dollars in damages and naming a number of individuals employed by the FAA.

A motion to dismiss and for summary judgment was filed in the second action; judgment was entered for all respondents on August 10, 1977. Cross-motions for summary judgment were filed in the Adjustment Board case, judgment was entered for American in that action on December 14, 1977. An appeal followed and on September 8, 1980, the Ninth Circuit affirmed the judgments of the district court.

ARGUMENT

A. The Court Below Fully Considered and Correctly Decided the Issues.

As a result of respondent Allied's efforts on petitioner's behalf, the Adjustment Board found that petitioner had a contractual right to return to flying status if he recovered from his disability within 5 years.

Such a result is in full accord with the principles set forth in *Union Pacific R. Co. v. Sheehan,* 439 U.S. 89 (1978), and *Vaca v. Sipes,* 386 U.S. 171 (1967).

B. The Unpublished Memorandum Below in No Way Conflicts with the Decisions of This Court or the Courts of Appeal.

It is well settled that a petition for a writ of certiorari will not be granted

> ". . . except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."

Rice v. Sioux City Cemetery, 349 U.S. 70, 79 (1955), *quoting Layne & Bowler Corp. v. Western Well Works, Inc.,* 261 U.S. 387, 393 (1923).

Certainly, an unpublished memorandum of decision which is without precedent, 9th Cir. R. 21(a) and (c), does not create a ". . . real and embarrassing conflict of opinion and authority . . ." warranting review by this Court.

But, even if the Ninth Circuit had published its decision, petitioner has failed to demonstrate any conflict whatsoever, let alone the existence of a dispute involving principles of public concern. All that the petition demonstrates is that "petitioner believes" the courts below erred in their reading of the record. And, this brings us to our third argument.

C. The Court Does Not Grant Certiorari to Review Evidence and Discuss Specific Facts.

Petitioner has asked this Court to decide whether there are any genuine issues of material fact in dispute which would operate to defeat summary judgment. The Court is simply not in that business:

> "We do not grant a certiorari to review evidence and discuss specific facts."

United States v. Johnston, 268 U.S. 220, 227 (1925). In *Graver Mfg. Co. v. Linde Co.,* 336 U.S. 271, 275 (1949), the Court stated:

> ". . . a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error."

Here, there is simply no such error. The mere assertion that a dispute of material fact exists does not create such a dispute. Indeed, petitioner himself asserted in the district court below in

the action challenging the decision of the Adjustment Board that there were no material facts in dispute: He filed a cross-motion for summary judgment and argued there were no material facts in dispute. We do not believe he can now be heard to argue otherwise.

CONCLUSION

The petition should not be granted.

Respectfully submitted,

DONALD D. CONNORS, JR.
JAMES L. MEEDER

Attorneys for Respondents
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-888

JAMES D. ROWBOTHAM, Petitioner,

v.

AMERICAN AIRLINES,

INC., et al, Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

JAMES D. ROWBOTHAM

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94061

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Petitioner In Pro Per

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STATEMENT OF CASE

Respondents' "Statement of Case" must be corrected in order to bring the material facts into proper context.

On June 7, 1973, petitioner was permanently discharged by American Airlines(American). In order to obtain reinstatement, petitioner had to first receive from American the contractually required prior written notice of dismissal under Section 27(A) of the Collective Bargaining Agreement(Agreement). Contractually, only after receipt of such written notice could petitioner dispute the discharge; however, American never furnished the petitioner with such notice.

Section 26(D)(1) of the Agreement also required written notice of medical concern from American:

> "The Company shall notify the pilot in writing, specifying the nature and extent of its concern (that his health or physical condition is appreciably impaired, Section 26 (D))"

That notice was never furnished petitioner, either.

The October 5, 1973 letter from American's Dr. Lederer to petitioner relied upon by respondents was not a letter of medical concern under Section 26(D), as the respondents infer. Respondents' Brief in Opposition pages 1-2 (RB,1-2). Such letter also contained:

> "We call your attention to a letter addressed to me dated August 21, 1973 sent by certified mail, regarding some action which you wanted taken under Section 26, paragraph D of the Pilot Agreement, We answered that letter, by certified mail, on August 28, 1973 telling you that we were still awaiting the medical review made on you by Dr. Benjamin Boshes...."

Four years later on August 10, 1977, Dr. Lederer testified:

> "Q. Did you send Rowbotham any letter of concern following the Boshes examination?
> A. No, I did not."
> (Lederer depo. 234;19-21)

The sentence, from the October 5, 1973 letter, quoted from by respondents (RB,1):

> "...permanently disqualified from flying status because of a convulsive brain disorder."

was introduced by this clause:

> "On September 13, 1973, I certified to the Insurance Department of American Airlines, specifically, Mr. Dan Desmond, Director of Insurance, that you were...."

By Dr. Lederer's own admission, the October 5, 1973 letter to the petitioner was not a letter of medical concern required by Section 26(D)--American considered the petitioner to be permanently discharged.

Reinstatement under the five year medical reinstatement provision of the Agreement, referred to by respondents (RB,4), would still have first required American to comply with Section 26(D) by furnishing petitioner with the required letter of medical concern. American repudiated all reinstatement under the five year medical reinstatement provision--Allied Pilots Association (Allied).did not object. See Petition pages 10-11, 20:

> (Allied) did not challenge statements by American's Corporate Medical Director that American would not furnish petitioner with the required notice of medical concern and that American would never allow petitioner to be medically evaluated by a three doctor panel as required by the Agreement. (Petition, 10-11)
>
> American repudiated all reinstatement procedures, and American's Corporate Medical Director and its Director of Pilots Contracts told Allied that the contractual medical evaluation procedures would never be allowed in petitioner's case--Allied did not protest.(Adjustment Board transcript)(Petition, 20)

Respondents infer that verbal allegations made to the American Airlines Pilots' System Board of Adjustment (Adjustment Board) by Allied's attorney Mr. Fisher and demands verbally made by the petitioner constitute proper dispute submission. (RB,3-4)

Section 29(A) of the Agreement establishes the Adjustment Board in compliance with Section 204, TITLE II, of the Railway Labor Act (Act). Section 29(A) limits the Adjustment Board's jurisdiction to disputes "properly submitted to it"; Section 204 of the Act limits the Adjustment Board's

jurisdiction to disputes "referred by petition". Pursuant to Section 29(E),(G) of the Agreement, the Adjustment Board can only consider desputes properly submitted to it in written petition by the President of Allied (Petition,23). Under Section 29(A), (E),(G) of the Agreement and Section 204 of the Act, demands by a grievant and allegations set forth by Allied's attorney in his opening remarks before the Adjustment Board are not contractually or statutorily proper grievance submissions and; therefore, outside the Adjustment Board's consideration and jurisdiction. Allied's President unequivocally set forth the sole "Question at Issue"(dispute) in his written petition to the Adjustment Board, as well as setting forth the limits of the Adjustment Board's jurisdiction, by quoting Section 29(E). (Petition,23)

ARGUMENT

A. THE PROPER ADMINISTRATION AND ENFORCEMENT OF THE RAILWAY LABOR ACT REQUIRES THE GRANT OF CERTIORARI HERE.

Federal courts may assume breach-of-contract jurisdiction over an employer, when employer's conduct amounts to repudiation of the remedial procedures contained in the collective bargaining agreement--regardless of whether the union breaches its duty of fair representation, VACA v SIPES, 386 U S 171, 185 (1967). The Ninth Circuit and the district court failed to apply the VACA employer repudiation exception to the facts in this case. See Petition, 27-28, 37-41.

Proper application of the exceptions to the doctrine requiring the exhaustion of contractual remedial procedures to breach-of-contract suits under the Railway Labor Act is of very real importance to the hundreds of thousands who are employed in the airline/railway industry. Proper administration of the Railway Labor Act cannot be

achieved, so long as the federal courts refuse to apply VACA to breach-of-contract suits under the Act.

Granted a review of the facts will be required to determine whether American repudiated the contractual remedial procedures; but the facts here are simply the vehicle by which this Court can insure that workers governed by the Railway Labor Act are not deprived of this obvious exception to the doctrine requiring the exhaustion of contractual remedial procedures.

B. A JURY TRIAL IS REQUIRED ON THE ISSUE OF WHETHER ALLIED PILOTS ASSOCIATION BREACHED ITS DUTY OF FAIR REPRESENTATION.

Respondents' argument that Allied fulfilled its obligation to petitioner by having the Adjustment Board acknowledge that the Agreement contained a five year medical reinstatement provision is illtaken. Reinstatement under such provision was unavailable to the petitioner, because he had already been permanently discharged; it was

also unavailable, because Allied breached its obligation to enforce petitioner's contractual rights by ignoring his June 7, 1973 discharge and his attempts to dispute such discharge through the contractual remedial procedures.

Whether Allied's refusal to "argue" for petitioner's reinstatement, without so advising petitioner, was arbitrary, discriminatory or in bad faith is a question for a jury. The Ninth Circuit deciding such an issue, which goes to the hart of the litigation, by summary judgment so far departs from the accepted and usual course of judicial proceedings as to invoke this Court's power of supervision. Rule 17.1. (a), Rules of the Supreme Court. See also VACA v SIPES, 386 U S 171 (1967).

C. FAILURE TO PUBLISH AN APPELLATE DECISION DOES NOT MAKE IT ANY LESS IN CONFLICT.

One of the prime purposes of the certiorari jurisdiction is to bring about uniformity of decisions on matters of federal

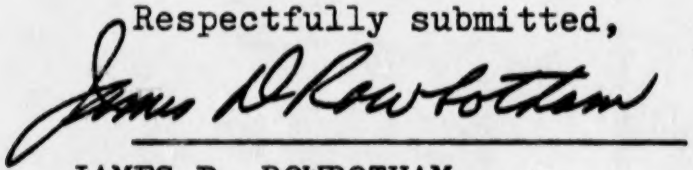
law amoung the federal courts of appeal. Rule 17.1.(a), Rules of the Supreme Court. The Supreme Court is to insure that litigants are treated uniformly in the circuit courts.

Respondents' agrument essentially is that the decision below can be grossly in conflict with decisions of other appellate courts but if it is not published, it is of no concern to this Court. Absurd!

CONCLUSION

The petition should be granted.

Respectfully submitted,



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Petitioner In Pro Per

January 1, 1981

APPENDIX A

Section 204, TITLE II, of the Railway Labor Act reads, in pertinent part:

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of interpretation or application of agreements concerning rates of pay, rules or working conditions...shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with full statement of the facts and supporting data bearing upon the disputes.

CERTIFICATE OF SERVICE

I hereby certify that on the 2 day of January, 1981, I served the within PETITIONER'S REPLY BRIEF on the interested parties in this action, by placing three true and correct copies in each of two sealed envelopes, with postage thereon fully prepaid, in the United States mail at Redwood City, California, addressed as follows: Solicitor General, Department of Justice, Washington, D.C. 20530,
Brobeck, Phleger & Harrison, One Market Plaza, San Francisco, CA 94105.

I CERTIFY under penality of perjury that the foregoing is true and correct, EXECUTED ON January 2, 1981 in Redwood City, California.

James D Rowbotham

JAMES D. ROWBOTHAM